

BEFORE THE
Federal Communications Commission
 WASHINGTON, DC 20554

RECEIVED

MAY - 4 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

AirTouch Paging, Inc.)

 Petition for an Extension of the CALEA
 Assistance Capability Compliance Date)

CC Docket No. 97-213

 Communications Assistance for
 Law Enforcement Act)

**PETITION FOR AN EXTENSION OF THE CALEA
 CAPABILITY ASSISTANCE COMPLIANCE DATE**

AirTouch Paging, Inc. ("AirTouch Paging"), pursuant to Section 1006(c)(1) of the Communications Act,¹ petitions the Commission to extend by two years the date by which it must comply with the assistance capability requirements imposed by the Communications Assistance for Law Enforcement Act ("CALEA")² — *if it is ultimately determined that AirTouch Paging's current interception practices do not comply fully with CALEA.*

Introduction and Summary

AirTouch Paging believes that its current interception practice of providing a "clone" pager satisfies CALEA's assistance capability requirements, a position which the Federal Bureau of Investigation ("FBI") confirmed as recently as December 1997. However, in February 1998 the FBI reversed course, suddenly taking the position that the provision of a "clone" pager is not sufficient — although, in changing its position, the FBI has chosen not to advise the

No. of Copies rec'd 0+11
 List ABCDE

¹ See 47 U.S.C. § 1006(c)(1).

² See Public Law 103-414, 108 Stat. 4279. CALEA is codified in various portions of Titles 18 and 47 of the United States Code, including 47 U.S.C. §§ 1001-10.

paging industry what or how it thinks the industry must become compliant. Despite leaving the paging industry “in the dark” over its CALEA compliance, the FBI has further taken the position in April 1998 that it would be “inappropriate at this time” for the Commission to grant a blanket extension of the CALEA compliance date for paging carriers.³

The FBI has placed AirTouch Paging (and other paging carriers) in an untenable position. Even if the Commission were to assume the validity of the FBI’s newest position that present paging interception practices are deficient under CALEA, AirTouch Paging — or any other paging carrier for that matter — cannot possibly comply with CALEA by October 25, 1998 so long as the FBI is unable (or unwilling) to identify its needs so the paging industry, in turn, can determine what is necessary to become compliant.⁴ An extension of the compliance date is warranted because, assuming *arguendo* that the FBI’s newest position is correct, CALEA compliance “is not reasonably achievable through the application of technology available within the compliance period.”⁵

³ Letter from David Yarbrough, FBI Supervisory Special Agent, to Magalie R. Salas, FCC Secretary, CC Docket No. 97-213, at 2 (April 14, 1998).

⁴ One of the problems industry has encountered with the FBI is the FBI’s erroneous belief that it can decide unilaterally what capabilities the industry should include in its implementing standard. *See, e.g.*, FBI Reply Comments, CC Docket No. 97-213, at 8 ¶ 12 and n.18 (Feb. 11, 1998). If the FBI were correct, there would have been no need for Congress to have included the deficiency petition procedure in CALEA. *See* 47 U.S.C. § 1006(b).

⁵ 47 U.S.C. § 1006(c)(2). Several broadband CMRS providers have filed petitions to extend the compliance date, and the Commission has requested comment on these petitions. *See Public Notice*, DA 98-762 (April 20, 1998). AirTouch Paging submits this petition because paging carriers face a unique situation given that the FBI has articulated neither its capacity nor its capability needs for the paging industry.

AirTouch Paging Is Entitled to An Extension of the CALEA Compliance Date Under the Statutory Standard for Extensions

AirTouch Paging has accommodated law enforcement's interception needs for some time. Specifically, it provides law enforcement with a "clone" pager upon receipt of an interception court order.⁶ Under this arrangement, the agency in question receives simultaneously the same messages received by the paging customer (the subject of the interception order) — at whatever location the agency chooses, because the "clone" pager is portable. This long-standing practice has worked well for both law enforcement and the industry. Indeed, but for recent developments, law enforcement agencies have never advised AirTouch Paging that this practice is inadequate or otherwise deficient, and the company therefore believed it was in compliance with CALEA.

Congress enacted CALEA in 1994 "to make clear a telecommunications carrier's duty to cooperate in the interception of communications for law enforcement purposes."⁷ Congress further directed the Attorney General, who delegated her responsibilities to the FBI, to publish law enforcement's capacity requirements by October 25, 1995 so industry could consider these requirements in satisfying CALEA's capability requirements.⁸ Although this statutory deadline expired *over 30 months ago*, the FBI has yet to publish law enforcement's capacity

⁶ Congress is currently considering legislation which would clarify the standards under which law enforcement can obtain a court order for a clone pager. *See* Clone Pager Authorization Act of 1996, S. 170, 105th Cong., 1st Sess. This bill passed the Senate on November 8, 1997, and it has been referred to the House for consideration.

⁷ H.R. Rep. No. 103-827, at 1 (1994)("House Report").

⁸ *See* 47 U.S.C. § 1003(a)(1).

requirements for the paging industry.⁹ Thus, as CALEA approaches its fourth anniversary, *the paging industry still has no idea what law enforcement's capacity requirements might be.*

CALEA also imposes certain assistance capability requirements on carriers, specifying that carriers are to meet these requirements by October 25, 1998.¹⁰ However, these statutory requirements are set forth in general terms only. For example, the call content requirement specifies that a carrier shall “expeditiously isolate and enable the government . . . to intercept . . . all wire and electronic communications carried by the carrier within a service area to and from equipment, facilities, or services of a subscriber of such carrier.”¹¹

AirTouch Paging believes that its long-standing practice of providing a “clone” pager meets both law enforcement’s needs and CALEA’s capability requirements. After all, even the FBI Director testified before Congress that CALEA was intended “*to preserve the status quo*” and “*to provide law enforcement no more and no less access to information than it had in the past.*”¹² Indeed, until recently, the FBI had indicated that current paging industry practices already satisfy CALEA’s requirements. As Motorola has advised the Commission, “the FBI has

⁹ The FBI did recently publish its capacity requirements for “certain” CMRS providers — namely, cellular and broadband PCS licensees. However, this notice did *not* include paging and other narrowband PCS licensees. See FBI, *Implementation of Section 104 of CALEA: Final Notice of Capacity*, 63 Fed. Reg. 12218, 12220 (March 12, 1998).

¹⁰ 47 U.S.C. § 1002(a).

¹¹ 47 U.S.C. § 1002(a)(1).

¹² House Report at 22 (emphasis added). Congress enacted CALEA because law enforcement testified that it was encountering problems in implementing certain interceptions. However, law enforcement never identified paging service interceptions as a problem, and the House Report accompanying CALEA did not enumerate paging in the list of services that Congress intended to cover. See *id.* at 15 and 20.

stated in several recent meetings that cloning of pagers satisfies CALEA obligations for traditional paging.”¹³

The FBI now appears to have reversed its position. AirTouch Paging advised the Commission in December that its practice of providing a “clone” pager “meets both law enforcement’s needs and CALEA’s capability requirements” and that “law enforcement agencies continue to be satisfied with the arrangement.”¹⁴ However, to the surprise of the paging industry, the FBI responded in February that “‘clone’ pager-based interceptions have only limited effectiveness and utility, and fail to fully meet CALEA’s section 103 requirements.”¹⁵ But in taking this new position, *the FBI has yet to advise AirTouch Paging (or any other paging carrier) why it thinks current paging practices are inadequate and how it thinks paging carriers can comply fully with CALEA’s assistance capability requirements.*

The Communications Act specifies that a “telecommunications carrier . . . may petition the Commission for one or more extensions of the deadline for complying with the assistance capability requirements.”¹⁶ The Act further provides that an extension should be granted “if the Commission determines that compliance with the assistance capability requirements . . . is not reasonably achievable through the application of technology available within the compliance period.”¹⁷

¹³ Motorola Reply Comments, CC Docket No. 97-213, at 7 and n.21 (Feb. 11, 1998).

¹⁴ AirTouch Comments, CC Docket No. 97-213, at 17 (Dec. 12, 1997).

¹⁵ FBI Reply Comments, CC Docket No. 97-213, at 22 ¶ 35 (Feb. 11, 1998).

¹⁶ 47 U.S.C. § 1006(c)(1).

¹⁷ *Id.* at § 1006(c)(2).

It is apparent that AirTouch Paging needs, and is entitled to, an extension of the current October 25, 1998 assistance capability compliance deadline. AirTouch Paging cannot possibly meet this deadline if the FBI suddenly adopts a new position that AirTouch Paging's current practices are inadequate yet is unwilling to tell AirTouch precisely how its practices are inadequate and what it thinks AirTouch must do to comply fully with CALEA's requirements.¹⁸ In short, the uncertainty makes a time extension essential. There is, therefore, no basis to the FBI's position that it would be "inappropriate at this time" for the Commission to extend the compliance deadline for paging carriers on an industry-wide basis.¹⁹

AirTouch Paging respectfully requests a two-year extension of the CALEA compliance date.²⁰ Two years is appropriate because the FBI has not indicated when it might be in a position to share its views regarding the paging industry's requirements under CALEA (both as to capacity and capability).²¹

¹⁸ AirTouch notes that CALEA "allows industry to develop standards to implement the [capability] requirements." House Report at 10. Thus, while industry may "consult" with law enforcement in developing its solution, *id.* at 19, law enforcement may not, ultimately, dictate its requirements on industry. *See, e.g.*, 47 U.S.C. § 1002(b); House Report at 19 ("[T]he telecommunications industry itself shall decide how to implement law enforcement's requirements."). If law enforcement believes the industry solution is inadequate, CALEA specifies that law enforcement shall file a deficiency petition with the FCC. *See* 47 U.S.C. § 1006(b); House Report at 27.

¹⁹ Letter from David Yarbrough, FBI Supervisory Special Agent, to Magalie R. Salas, FCC Secretary, CC Docket No. 97-213, at 2 (April 14, 1998). The FBI's position is especially inexplicable because it *supports* an extension for broadband CMRS providers, for whom a capacity notice has been published and for whom the agency has specified its controversial capability needs. In contrast, the paging industry has received no such information from the FBI.

²⁰ The Communications Act authorizes the Commission to grant an extension "that is two years after the date on which an extension is granted. 47 U.S.C. § 1006(c)(3)(B).

²¹ It bears emphasis that Congress designed CALEA to give industry "a *four* year transition period in which to may any necessary changes in their facilities." House Report at 18

Conclusion

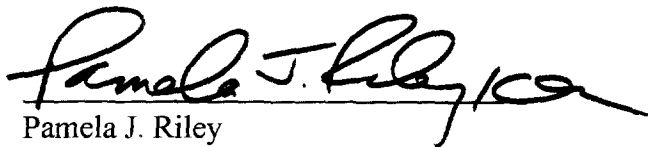
WHEREFORE, for the foregoing reasons, AirTouch Paging respectfully requests that the Commission extend by two years the date by which it must comply with CALEA's capability assistance requirements. During this extension period, AirTouch Paging will continue its current practice of providing "clone" pagers to law enforcement.

In addition, other paging carriers face the identical situation as AirTouch Paging. Administrative efficiency would suggest that the Commission therefore grant a similar extension to all paging carriers.

Respectfully submitted,

AIRTOUCH PAGING, INC.

By:



Pamela J. Riley
David A. Gross

AirTouch Communications, Inc.
1818 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 293-3800

Mark A. Stachiw
AirTouch Paging, Inc.
Three Forest Plaza
12221 Merit Drive, Suite 800
Dallas, TX 75251

Attorneys for AirTouch Paging, Inc.

May 4, 1998

CERTIFICATE OF SERVICE

I, Loretta B. Rias, hereby certify that on this 4th day of May, 1998, copies of the foregoing Petition for an Extension of the CALEA Capability Assistance Compliance Date were served by first-class United States mail, postage prepaid, to the following:

Louis J. Freech, Director
Larry R. Parkinson, General Counsel
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Honorable Janet Reno, Attorney General of the U.S.
Stephen W. Preston, Deputy Assistant Attorney General
Douglas N. Letter, Appellate Litigation Counsel
Civil Division
U.S. Department of Justice
601 D Street, N.W., Room 9106
Washington, D.C. 20530

David Wye*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002-C
Washington, D.C. 20554


Loretta B. Rias

*By Hand